IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.CRIMINAL MISC. PETITION NO. 1008/2006
(Gopal Krishan Vs. State of Rajasthan & Anr.)

Date of Order : 16/11/2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Vishawjeet Joshi for the petitioner.
Mr. Ashok Upadhyay, public prosecutor for the State.
None present for the non-petitioner No.2.

BY THE COURT:-

By the instant petition under Section 482 Cr.P.C., the petitioner seeks quashing of criminal Complaint Case No. 247/05 pending in the Court of Judicial Magistrate, Ist Class, Rajsamand (for short 'the trial court' hereinafter) for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act' hereinafter).

Heard learned counsel for the parties. Carefully gone through the complaint filed by non-petitioner No.2.

It is contended by learned counsel for the petitioner that no notice demanding the cheque amount has been served on the petitioner and therefore, the petitioner is not liable for the offence.

From the perusal of the complaint, the affidavit of the

complainant as also memo of petition, it appears that the petitioner took a loan of Rs. 1 lac from the non-petitioner No.2. In the return of said loan amount, the petitioner issued a cheque bearing No.066715 on 1.9.2004. The cheque on being presented to the bank was received unpaid and as such was dishonoured on the ground of stop payment and an intimation to this effect was received by the non-petitioner No.2 complainant from the bank. A notice demanding the cheque amount within 15 days from the date of receipt of the notice was given to the petitioner by the complainant. The notice was sent on the correct address of the petitioner, however, the notice could not be served on the petitioner as per the report of the postman for 4-5 days as the petitioner was out of the house. The said notice was returned on 1.10.2004 with the endorsement unclaimed. The petitioner failed to make the payment within 15 days from that date and even thereafter and therefore, a complaint under Section 138 of the Act was filed before the trial court by the non-petitioner No.2. So far as the stop payment is concerned, the returning of cheque unpaid on the ground of stop payment would mean that the amount of money stood to the credit of that account is insufficient to honour the cheque as envisaged under Section 138 of the Act.

In Goaplast Pvt. Ltd. Vs. Chico Ursula D'Souza and Ors. 2006 (2) NIJ 487 (SC) Hon'ble Supreme Court held that on

the faith of payment by way of a postdated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Sec. 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date and therefore, the stoppage of payment before the due date of the cheque would attract the provisions of Section 138 of the Act.

So far as the service of notice is concerned, the notice demanding the cheque amount was sent to the petitioner on his correct address. The postman went to deliver the notice for as many as five times. A message was left at his home. Therefore, it cannot be said that no notice was given to the petitioner demanding the cheque amount before launching the prosecution.

The important point to be decided in this case is: whether the cause of action has arisen at all as the notice sent by the complainant to the accused was returned with the endorsement "house been locked." The conditions pertaining to the notice to be given to the drawer have been formulated and incorporated in Clauses (b) to (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881, which read as under:-

> "(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a

> notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
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> (c) the drawer of such cheque fails to make the payment of the said amount to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

On the part of the payee, he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the Legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice. It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment.

If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running, no matter that the payee sent the notice on the correct address, a trickster cheque drawer could get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act, 1881" hereinafter). The payee has the statutory obligation to "make a

demand" by giving notice. The thrust in the clause is on the need to "make a demand." It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched, his part is over and the next depends on what the sendee does.

In K. Bhaskaran Vs. Sankaran Vaidhyan Balan & Anr., (1999) 7 SCC 510, the Hon'ble Supreme Court observed that if a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice at the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure. The Apex Court further held as under:-

> "No doubt Section 138 of the Act does not require that the notice should be given only by 'post.' Nonetheless the principle incorporated in Section 27 of the General Clauses Act, 1897 can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as to drawer of the cheque who is

> liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."

In V. Raja Kumari Vs. P. Subbarama Naidu & Anr., JT 2004 (9) SC 431, the Hon'ble Supreme Court held that where the sender has despatched the notice by post with the correct address written on it, then it can be deemed to have been served.

In State of M.P. Vs. Hiralal & ors., JT 1996 (1) SC 669, the Hon'ble Apex Court held that if the drawer of the addressee obviously managed to have the notice returned with postal remarks "not available in the house", "house locked" and "shop closed" then it must be deemed that the notices have been served on the respondents.

In Madhu Vs. Omega Pipes Ltd., 1994 (1) ALT (Cri) 603 (Kerala), the Kerala High Court held that if the payee has despatched notice in the correct address of drawer reasonably ahead of the expiry of fifteen days, it can be regarded that he made the demand by giving notice within the statutory period and further observed that any other interpretation is likely to frustrate the purpose for providing such a notice.

Thus, it is well settled law that if a notice is sent at the correct address but returned with the endorsement like "not available", "door was locked" etc. then the presumption of service ought to have been drawn. However, the burden is on

the complainanjt to show that the accused has managed to get an incorrect postal endorsement made. What is the effect of it has to be considered during trial, as the statutory scheme unmistakably shows the burden is on the complainant to show the service of notice. Therefore, where material is brought to show that there was false endorsement about the non-availability of noticee, the inference that is to be drawn has to be judged on the background of facts of each case.

Keeping in view, the decision of Hon'ble Supreme Court referred above and the facts of the instant case, in my view, the notice demanding the cheque amount was sent to the petitioner on his correct address and therefore, at this stage, it cannot be said that there is no compliance of Section 138 of the Act warranting quashing of criminal complaint. In this view of the matter, no case for quashing the complaint is made out. The petition is, therefore, dismissed. Stay petition also stands dismissed.

(H.R.PANWAR),J.

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